

Message

From: Feldman, Michael [Feldman.Michael@epa.gov]
Sent: 2/22/2018 7:46:32 PM
To: Snyder, Erik [snyder.erik@epa.gov]
Subject: FW: materials for tomorrow's SO2 NAAQS meeting with Clint
Attachments:

Deliberative Process / Ex. 5

From: Feldman, Michael
Sent: Wednesday, February 21, 2018 9:34 AM
To: Donaldson, Guy <dona1dson.guy@epa.gov>; Watson, Lucinda <watson.lucinda@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>; Olszewski, Joshua <olszewski.joshua@epa.gov>
Cc: Casso, Ruben <Casso.Ruben@epa.gov>
Subject: FW: materials for tomorrow's SO2 NAAQS meeting with Clint

From: Etchells, Elizabeth
Sent: Wednesday, February 21, 2018 9:22 AM
To: Feldman, Michael <Feldman.Michael@epa.gov>; Casso, Ruben <Casso.Ruben@epa.gov>
Subject: FW: materials for tomorrow's SO2 NAAQS meeting with Clint

Latest versions. Thanks.

SO₂ Designations Round 2 Petitions Options Selection Briefing February 22, 2018

Overview:

As part of Round 2 of the 2010 SO₂ NAAQS designations, EPA designated 7 areas as nonattainment in 2016. The designations for four of those seven areas have been challenged in the D.C. (Illinois area) and 5th Circuits (Texas areas), and are currently in abeyance pending administrative action by EPA.¹

EPA indicated in letters sent (Sep. 2017) to the facility owners (Southern Illinois Power Cooperative and Vistra Energy/Luminant), in response to their administrative petitions, that EPA would “revisit” these four nonattainment designations through a notice and comment action. We did not specify an intended basis or timing, but noted that the nonattainment designations remained effective in the meantime.

Decisions Needed: Determine for each area whether/how to:

- Revisit and potentially revise the initial designation through notice and comment, or
- Work with the state agency to suspend the SIP submission obligation and/or redesignate the area to attainment.

Timing Concerns:

- The Williamson County, IL attainment plan SIP is due March 12, 2018.
- The Texas area attainment plan SIPs are due July 12, 2018.
- Status reports are due in the circuit courts every 90 days, next due April 12, 2018 (5th Circuit) and April 30, 2018 (D.C. Circuit).

Nonattainment Area (all partial counties)	Major SO ₂ Source
Williamson County, IL	Southern Illinois Power Cooperative, Marion Power Station
Freestone & Anderson Counties, TX	Vistra Energy/Luminant, Big Brown (shut down)
Rusk & Panola Counties, TX	Vistra Energy/Luminant, Martin Lake
Titus County, TX	Vistra Energy/Luminant, Monticello (shut down)

Note: EPA is currently defending “unclassifiable” Round 2 designations in the D.C. Circuit on the basis that EPA considers all available information regarding then-current air quality at the time of signature of the final action.

The Options in Brief:

¹ Challenges to other areas designated in Round 2 are separately moving forward in the D.C. Circuit.

Williamson County, IL (SIPC-Marion)

Option 1 – Propose a Clean Data Determination with notice and comment, to suspend the attainment SIP obligation.

Option 2 - Propose an error correction with notice and comment, to change the designation to attainment/unclassifiable.

Option 3 - Citing EPA's desire to reconsider the prior action on procedural grounds, re-propose nonattainment and specifically request comment on evidence that public access is precluded from all boundaries of the Northern Property. Finalize designation of attainment if sufficient evidence is received.

Freestone/Anderson and Titus Counties, TX (Big Brown & Monticello, shut down)

Option 1 - Propose redesignation to attainment with notice and comment.

Option 2 - Propose a Clean Data Determination with notice and comment, to suspend the attainment SIP obligation.

Option 3 - Grant TCEQ's petition for reconsideration through a proposed rulemaking with notice and comment to change the designation to attainment/unclassifiable.

Panola/Rusk Counties, TX (Martin Lake)

Option 1 - Grant Vistra's and/or TCEQ's petition for reconsideration to take the form of a proposed rulemaking in approximately 2021 with notice and comment to change the designation to attainment.

Option 2 - Grant Vistra's and/or TCEQ's petition for reconsideration through a proposed rulemaking with notice and comment to change the designation to unclassifiable.

Williamson County, IL SO₂ Nonattainment Area (Marion Power Station)

Summary

EPA designated the Williamson County, IL area nonattainment for the 2010 1-hour SO₂ NAAQS, effective September 12, 2016. The deadline for Illinois to submit an attainment plan for this area is March 12, 2018.

The nonattainment designation was based on EPA's analysis of air quality modeling submitted by Southern Illinois Power Cooperative (SIPC, owner of Marion Power Station), Sierra Club, and Illinois EPA. EPA relied mainly on the Sierra Club modeling showing violations at certain receptors, based on EPA's determination that those receptors' locations were in ambient air and therefore should be considered in designations.

SIPC filed a petition for judicial review of the Round 2 designations and has twice administratively petitioned EPA to change the nonattainment designation, submitting new information to support claims that the violating receptor area was and/or is under controlled access and is not ambient air. In January 2017, EPA denied SIPC's petition for reconsideration under then-Administrator McCarthy, and SIPC filed a petition for judicial review of that denial, which is consolidated with their previous challenge. In Sep. 2017, EPA responded to SIPC's subsequent petition for error correction by indicating an intent to undertake an administrative action with notice and comment to revisit the nonattainment designation, and the D.C. Circuit granted EPA's motion to place the judicial petitions in abeyance on this basis. The area in Williamson County, IL remains nonattainment pending the outcome of EPA's intended administrative action.

Background

The Marion Power Station is located in Williamson County, IL, adjacent to the Lake of Egypt. The primary issue for the designation of this area is whether or not modeling receptors showing nonattainment should have been relied on in SO₂ designations when those receptors were located on Marion's Northern Property (shown in the red box in Figure 1 below) but not within the facility's then-existing fence line. During public comment on the designations, SIPC argued that the receptor locations should have been excluded pursuant to EPA's traditional ambient air policy, such as in PSD modeling, where receptors can be excluded from the modeling results if public access to the area is precluded by a fence or other physical barriers, as such areas are excluded from the definition of ambient air. In their Sep. 2016 submission, SIPC claims to have increased/added measures to preclude public access to the Northern Property since the July 2016 promulgation of the final designation, but these efforts appear to focus only on the southern boundary portion of the area fronting the Lake of Egypt.

Action Timeline

- *Sep. 2015 – Mar. 2016* – EPA received modeling from three parties for the area around Marion Power Station prior to the intended designations and during the public comment period:
 1. Illinois EPA (submitted Sep. 2015) – modeled 2012-2014 meteorology and emissions, excluded receptors only on facility-owned property believed to be behind fence lines.

2. Sierra Club (submitted Sep. 2015 and Mar. 2016) – modeled 2012-2014 meteorology and emissions, excluded receptors only on facility-owned property believed to be behind fence lines.
3. AECOM, SIPC's consultant (submitted Mar. 2016) – modeled 2013-2015 meteorology and emissions, excluded receptors on all facility-owned property.

Figure 1. Area around Marion Power Plant, Williamson County, IL. The Northern Property area is inside the red box.



- *Jul. 2016* – EPA promulgated a designation of nonattainment for the area as part of Round 2 of the 2010 SO₂ NAAQS designations,² based on the conclusion that the Northern Property was ambient air and thus there was no basis for excluding receptors where modeling from Sierra Club found NAAQS violations. Designation effective date was in Sep. 12, 2017.
- *Sep. 2016* – SIPC submitted a petition for reconsideration of the final area designation for the Williamson County area. SIPC alleged several flaws in EPA's decision, including that the Marion Station's "Northern Property was erroneously considered ambient air." SIPC also filed a petition for review of the Round 2 designations.
- *Jan. 2017* – EPA denied SIPC's request for reconsideration.

² See 81 FR 45039. The final rule was signed by the Administrator on June 30, 2016, published in the Federal Register on July 12, 2016, and was effective on September 12, 2016.

- *Feb. 2017* – SIPC filed a petition for review of EPA’s reconsideration denial.
- *Jun. 2017* – SIPC submitted a petition for error correction requesting that the EPA correct errors in its nonattainment designation for the Williamson County area.
- *Sep. 2017* – EPA notified SIPC that we intend to undertake an administrative action with notice and comment to revisit the nonattainment designation for the Williamson County area.
- *Nov. 2, 2017* – D.C. Circuit grants motion to hold two SIPC petitions for review in abeyance, with status reports due every 90 days.
- *Jan. 2018* – EPA promulgated Round 3 SO₂ designations,³ citing to the March 2015 SO₂ designations guidance stating that modeling receptors can be excluded where the record supports that it is not feasible to site a monitor.

Assessment of Barriers to Public Access

Facts in Record at signature.

- SIPC’s consultant’s submission asserted that the Northern Property, across the street from the facility, was owned by SIPC and that “[t]his area is restricted from public access.”
- EPA consulted Google “Street view” and Google Earth images of the portion of the Northern Property abutting Lake Egypt Road, to determine if there was other available information that showed physical barriers to public access. Those images showed a standard roadway guardrail but no fencing along an approximately 2,400-ft portion of the property line abutting Lake Egypt Road.

Measures in place at July 2016 promulgation/signature but not in record. Taking SIPC’s reconsideration petition statements at face value:

- Portion of Northern Property along Lake Egypt Road: 24-hour video surveillance, warning signs, barbed wire fencing along some portions of the property, a guardrail, a 30-ft embankment (EPA assessment is a slope between 13-19 degrees, typically about 15 degrees), and 55 mph road speed on Lake Egypt Road.
- Rest of Northern Property: SIPC states that the “security camera feed provides a complete, unobstructed, view of all access points to the Northern Property,” with an attached image and affidavit that do not specify how this occurs in the wooded portions. SIPC provides detailed discussion only regarding the southern boundary of the area; no other evidence is provided that public access is precluded from the other boundaries of the area.

Measures in place by September 2016 effective date of designation.

- Additional fencing (approximately 200 ft) and signs added along Lake Egypt Road, shown in photos submitted to EPA.
- SIPC has provided no other evidence that any measures are in place around the rest of the Northern Property perimeter.
Note: In current day access to Google “Street View” and Google Earth images, chain link fencing is evident along the western boundary, but there is no clear evidence of fencing along the entirety of the northern and eastern boundaries.

³ See 83 FR 1098. The final rule was signed by the Administrator on December 21, 2017, published in the Federal Register on January 9, 2018, and is effective on April 9, 2018.

Next steps and options

Option 1:

Mechanism: Suspend attainment SIP submission obligation with a Clean Data Determination through notice and comment.

Basis: Determine that SIPC's modeling, in combination with more recent information and post-designation improvements, is sufficient to show the area is attaining the SO₂ standard. Request additional information from SIPC regarding access preclusion on the eastern, northern, and western boundaries of the Northern Property. Use company's post-designation improvements to southern boundary fencing and additional details received on the other boundaries to conclude that public access is now precluded and the SIPC modeling can be used (with the Northern Property receptors excluded) to support a Clean Data Determination.

Other Considerations: Area remains nonattainment but the attainment SIP obligation is suspended. Illinois would still need to develop and submit a redesignation request including a 10-year maintenance plan.

Legal Risk:

- **Low to High**, degree of risk depends on whether adequate facts are compiled for EPA to reasonably conclude that the Northern Property receptors can now be excluded from the modeling. EPA might also face adverse comments challenging the use of older modeling (2013-2015) in a Clean Data Determination, and degree of risk in proceeding with final action will depend on whether we have facts to support the reasonableness of using that modeling (comparable emissions and meteorology between 2013-2015 and more recent years, for instance).

Option 2:

Mechanism: Propose an error correction to the Williamson County, Illinois nonattainment designation with notice and comment, to change the designation to attainment/unclassifiable.

Basis: Request additional information from SIPC regarding access preclusion on the eastern, northern, and western boundaries of the Northern Property. Use company's post-designation improvements to southern boundary fencing and additional details received on the other boundaries to conclude that public access is now precluded. Find that EPA erred in concluding that the public has access to the northern area with the modeled nonattainment receptors based on the information provided by SIPC, assuming we receive further details regarding access preclusion on the eastern, northern, and western boundaries of the Northern Property.

Legal Risk:

- **High**, if finalized as proposed, regardless of what new facts are compiled regarding the other three boundary lines, as the final action would appear to rely on facts that occurred post-signature of the final action for at least the portion of the Northern Property along Lake Egypt Road. Under CAA 110(k)(6), an error correction changes an action that "was in error" when EPA took its final action, through misapplication of facts or lawful policy used at that time.

- Additionally, to state that changed facts post-signature constitutes an error arguably opens all similarly situated actions up to challenge as illegal and requiring correction by EPA, such as where new data shows a violation of the NAAQS.

Option 3:

Mechanism: Citing EPA’s desire to reconsider the prior action on procedural grounds, re-propose nonattainment and specifically request comment on evidence that public access is precluded from all boundaries of the Northern Property. If access preclusion is adequately demonstrated, we could finalize a designation of attainment/unclassifiable. We should signal either that: (1) we will accept new access barriers constructed after June 2016, or (2) we are looking only for information about access barriers in place prior to June 2016.

Basis: Arguably SIPC did not fully understand what level of detail was needed by EPA to exclude this parcel from the analysis. A re-proposal provides the company (and others) an opportunity to provide further details regarding access preclusion on the eastern, northern, and western boundaries of the Northern Property.

Other Considerations: Revisiting a final designation based on information about air quality impacts that post-date the promulgation date would be a procedural first for EPA. If we evaluate all new information and determine that our original final nonattainment designation was appropriate, we would explain this conclusion in a final action not altering the nonattainment designation, and then defend our determination(s) in litigation.

Legal Risk:

- **Risk from record- Low to High**, degree of risk if we finalize an attainment/unclassifiable designation depends on whether adequate facts are compiled for EPA to reasonably conclude that the Northern Property receptors can now be excluded from the modeling. Potentially higher risk if the barriers to public access necessary for exclusion only occurred post-signature.
- **Risk from mechanism- Moderate to High** risk that a court would disagree that EPA has authority to “reconsider” an initial designations under section 107(d)(1), rather than correct an error under section 110(k)(g), or formally redesignate under section 107(d)(3), where the action was not a CAA section 307(d) rule, with highest risk where basis clearly does not meet error correction or redesignation requirements (i.e. not specifying an error made by EPA, basing the change on post-signature facts, or no approved maintenance plan).

**Three Texas SO₂ Nonattainment Areas
(Big Brown, Martin Lake, and Monticello Power Stations)**

Summary

Three nonattainment areas were designated in Texas in a supplement to Round 2 of the SO₂ designations⁴ – Freestone/Anderson Counties (Luminant Big Brown), Rusk/Panola Counties (Luminant Martin Lake), and Titus County (Luminant Monticello). The attainment plan SIPs are due for each area by July 12, 2018.

The final nonattainment designations were based on a more refined second set of Sierra Club modeling submitted during the public comment period on EPA's intended designations, with generally narrower area boundaries than EPA had originally intended to designate. EPA's intended area designation was based on the first set of Sierra Club modeling available before the 120-day letters. Luminant also submitted modeling during the public comment period, but EPA did not rely on the company's analysis because it was based on non-EPA approved and technically unreliable algorithms in AERMOD. The Texas Commission on Environmental Quality (TCEQ) also submitted Luminant's modeling as an attachment to their comments during the comment period but did not submit any additional modeling. Industry and state petitioners either believe all of these areas are either "attainment" or "unclassifiable" and have argued in their administrative petitions that air quality should be characterized with monitors rather than modeling. Sierra Club has indicated they intend to challenge the boundary line of the Freestone/Anderson Counties designation in its petition for review, contending that a facility in neighboring Limestone County (designated unclassifiable/attainment) contributes to nonattainment in Freestone/Anderson Counties.

Background and New Information

There are likely two distinct groupings of issues for the three nonattainment areas in Texas:

1. **Freestone/Anderson and Titus Counties:** Luminant Big Brown and Luminant Monticello have reportedly ceased operations as of Feb. 12, 2018, and Jan. 4, 2018, respectively. For the shutdowns to be considered permanent, the New Source Review (NSR) SIP permits will need to be rescinded and the emissions removed by TCEQ from the emission inventory. Big Brown and Monticello are the largest SO₂ emissions sources in the respective designated areas, and neither area has any other emission source above 1 ton per year. Limestone is located 48 km away from the Big Brown area, and emitted approximately 28,000 tons of SO₂ in 2014.
2. **Panola/Rusk Counties:** The Luminant Martin Lake facility will continue to operate. Texas began operation of a new SO₂ monitor for this source on November 1, 2017. The monitor will have the required amount of data for a valid 3-year design value by 2021, assuming there are no quality assurance issues.

Industry and state petitioners are currently pursuing reconsideration requests, stating they find it preferable to certain other more traditional implementation paths. In particular, Texas believes it doesn't make sense to provide for maintenance plans covering 20 years for sources that have been shut down.

⁴ See FR Notice and dates to be filled in once someone has internet connection. In addition to these three nonattainment areas, one area in Texas (Milam County) was designated as unclassifiable.

Additionally, Milam County (Luminant Sandow) in Texas was designated unclassifiable in Round 2 SO₂ designations. No modeling was submitted by Sierra Club, Luminant, or the State for this area. The Sandow power plant also has ceased operations, but may follow a more traditional redesignation pathway from unclassifiable to attainment/unclassifiable because there are no associated maintenance plan requirements. A new SO₂ monitor was deployed in the Milam County unclassifiable area on November 19, 2016. The monitor will have the required amount of data for a valid 3-year design value by 2020, assuming there are no quality assurance issues.

Petitioners

- Vistra Energy/Luminant (Luminant Generation Company/Big Brown Power Company/Sandow Power Company/Luminant Mining Company), Petition for Review and Petition for Reconsideration and Administrative Stay
- State of Texas/TCEQ, Petition for Review, Request for Administrative Stay, and Petition for Reconsideration
- Sierra Club, Petitions for Review

Action Timeline

Dec. 2015 – First set of Sierra Club modeling submitted to EPA for Big Brown, Martin Lake, and Monticello power plants.

Mar. 2016 – Updated Sierra Club modeling submitted during the Round 2 public comment period for Big Brown, Martin Lake, and Monticello power plants.

Jun. 2016 – The 4 areas in Texas were granted an extension to the consent decree deadline. Final signature deadline was Nov. 2016.

Dec. 2016 – Four Texas designations promulgated, 3 nonattainment and 1 unclassifiable (effective date Jan. 12, 2017).

Feb. 2017 – Vistra Petition for Reconsideration and Administrative Stay

Mar. 2017 – TCEQ Petition for Administrative Stay

Sep. 2017 – EPA notified Vistra that we intend to undertake an administrative action with notice and comment to revisit the designations for the 3 nonattainment areas, and that EPA is considering a variety of options, some of which may alleviate associated and pending planning obligations.

Dec. 2017 – TCEQ Petition for Reconsideration, including information regarding the upcoming shutdown of 3 of the 4 power plants

Next Steps and Options

Option 1 for Freestone/Anderson and Titus Counties

Mechanism: Propose redesignation to attainment with notice and comment.

Basis: Once the shutdowns are made permanent and enforceable and a maintenance plan has been submitted for approval into the SIP, the state or Region 6 could immediately initiate a redesignation process for Freestone/Anderson and Titus counties based on either an evaluation that existing modeling is sufficient to demonstrate attainment or new modeling with the shutdown power plant emissions removed.

Other Considerations: Texas would need to submit a limited maintenance plan. This would still require Texas to develop a SIP revision in order for areas with shut down sources to be redesignated to attainment. EPA will explore options to minimize maintenance plan requirements to only what is necessary. After the area is redesignated to attainment, sources are subject to PSD, not major NSR permitting.

Legal Risk:

- **Low**, assuming modeling that included the shutdowns showed attainment of the NAAQS. If those shutdowns were sufficient to demonstrate attainment, meeting the other requirements of 107(d)(3)(E) would substantively be simple and very defensible. This action would be consistent with similar redesignations we have promulgated in the context of other NAAQS (e.g. redesignations of single- or predominant-source nonattainment areas for lead or SO₂ based on shutdowns), but EPA has not been challenged on this approach.

Option 2 for Freestone/Anderson and Titus Counties

Mechanism: Propose a Clean Data Determination with notice and comment.

Basis: Once the shutdowns are made permanent and enforceable, an analysis based on existing modeling, new modeling and/or emission projections that takes the shutdowns into account is required to support the determination of attainment. EPA could conduct either an evaluation that existing modeling is sufficient to demonstrate attainment, or new modeling with the shutdown power plant emissions removed to support the clean data determination.

Other Considerations: The area retains the nonattainment designation but the obligation to satisfy attainment planning requirements is suspended. The demonstration relied on here could become the basis for a redesignation request and maintenance plan from the State. Redesignation would still require Texas to develop a SIP revision in order for areas with shutdown sources to be redesignated to attainment.

Legal Risk:

- **No-to-Low**, assuming that the analysis that accounts for the shutdowns shows the area is attaining the NAAQS.

Option 3 for Freestone/Anderson and Titus Counties

Mechanism: Grant TCEQ's petition for reconsideration through a proposed rulemaking with notice and comment to change the designation to attainment/unclassifiable.

Basis: Once the shutdowns are made permanent and enforceable, an analysis based on existing modeling, new modeling and/or emission projections that takes the shutdowns into account is required to support the revised designation. We should signal that in making this change EPA would be relying on new information about emissions after the December 2016 promulgation date.

Other Considerations: Revisiting a final designation based on information about air quality impacts that post-date the promulgation date would be a procedural first for EPA. If we evaluate all new information and determine that our original final nonattainment designation was appropriate, we would explain this conclusion in a final action not altering the nonattainment designation, and then defend our determination(s) in litigation.

Legal Risk:

- **Moderate to High**, if finalized as attainment/unclassifiable, depending on whether a court would agree that EPA has authority to reconsider designations, particularly when relying on facts that occurred post-signature of the final action, when the statute only specifies error correction and redesignation authority for designations and this action was not a CAA section 307(d) rule.

Option 1 for Panola/Rusk Counties

Mechanism: Grant Vistra's and/or TCEQ's petition for reconsideration to take the form of a proposed rulemaking in approximately 2021 with notice and comment to change the designation to attainment if monitoring data indicate attainment. Note, the area will still be nonattainment until three years of monitoring data are available and Texas would still have a July 2018 SIP attainment plan deadline.

Basis: If the new monitor shows attainment of the NAAQS; the three-year monitored design value will be available in 2021, assuming there are no quality assurance issues. This also depends on whether Martin Lake has limits in place that allow us to reasonably assume improvement in air quality is permanent and enforceable, that the monitor is located in the area of maximum concentration, and that the State has submitted a maintenance plan.

Legal Risk:

- High risk to change designation in 2021 based on reconsideration of earlier designation, for reasons articulated earlier. Low risk to redesignate, assuming three years of valid monitored data is clean, monitor is located in area of maximum concentration, and improvements in air quality are due to permanent and enforceable limits. This latter scenario is a very typical redesignation action and very defensible.

Option 2 for Panola/Rusk Counties

Mechanism: Grant Vistra's and/or TCEQ's petition for reconsideration through a proposed rulemaking with notice and comment to change the designation. The designation for the area would be changed to unclassifiable until additional monitoring data are available.

Basis: Prior to the final 2016 nonattainment designation, the state repeatedly asserted that monitoring was the only appropriate way to characterize SO₂ air quality in this jurisdiction, but due to the timing associated with Round 2 designations they were not afforded the same opportunity to choose a monitoring pathway for Martin Lake as was afforded for other undesignated areas under the terms of the SO₂ NAAQS Data Requirements Rule (DRR). In the reconsideration, EPA would propose to honor Texas's air quality characterization preference and ignore Sierra Club modeling on what would amount to procedural grounds.

Other Considerations: Revising the designation to Unclassifiable would mean that a separate action would still be required to redesignate the area to Attainment/Unclassifiable, if Texas wanted to pursue that. The monitor that began operation in November 2017 will have the required amount of data for a valid 3-year design value by 2021, assuming there are no quality assurance issues. This outcome would be similar to outcomes for several unclassifiable Round 2 areas and all undesignated Round 4 areas, except those areas are expected to have the required amount of data for a 3-year design value one year earlier. If we evaluate public comments and determine that our original final nonattainment designation was appropriate, we would then defend it in litigation.

Legal Risk:

- **High**, as finalizing an unclassifiable designation on this basis is 1) arguably factually inaccurate regarding the impact of the DRR on designations, and 2) likely contrary to the CAA, which requires EPA to make a conclusion that the area cannot be classified on the basis “available information” when designating an area unclassifiable.
 - Texas did not begin operating a monitor to characterize this area until November 2017, one year after EPA promulgated the nonattainment designation and 11 months after the DRR monitoring deadline.
 - EPA considered all available information including modeling information from Sierra Club and industry at the time of designation. EPA has consistently interpreted the statute to allow reliance on modeling for SO₂ designations since 1971, and most recently relied on representative available modeling in Round 3. For example, in Round 3, EPA designated an area attainment/unclassifiable based on modeling, despite monitoring information showing a violation of the NAAQS.
 - The statute does not make a distinction between available information that the state prefers or does not prefer. The DRR does not alter the requirements of the statute.
 - Note: EPA is currently defending “unclassifiable” Round 2 designations in the D.C. Circuit on the basis that EPA considers all available information regarding then-current air quality at the time of signature of the final action, and specifically argued that the DRR does not control what information EPA may rely on in Round 2 designations.

SO₂ NAAQS Designations Round 2 Litigation Summary

Areas with Administrative and Judicial Petitions

Areas:

- 3 Texas nonattainment areas – Freestone/Anderson Counties (Luminant Big Brown), Titus County (Luminant Monticello), and Rusk/Panola Counties (Luminant Martin Lake)
- Limestone Co, TX (NRG Limestone), an unclassifiable/attainment area near the Freestone/Anderson, TX nonattainment area challenged by Vistra and Texas

Petitioners:

- Vistra Energy/Luminant (Luminant Generation Company/Big Brown Power Company/Sandow Power Company/Luminant Mining Company), Petition for Review and Petition for Reconsideration and Administrative Stay
- State of Texas/TCEQ, Petition for Review, Request for Administrative Stay, and Petition for Reconsideration
- Sierra Club, Petitions for Review

Issue(s): Industry and state petitioners either believe all of these areas are either “attainment” or “unclassifiable” and have argued in their administrative petitions that air quality should be characterized with monitors rather than modeling. Sierra Club challenges the Freestone/Anderson Counties and Limestone County designations, contending that Limestone contributes to nonattainment in Freestone/Anderson Counties. The 2 plants in Freestone/Anderson and Titus Counties reportedly will be shut down by mid-February, 2018, though the date that these shut downs will be made federally enforceable is currently unknown. New SO₂ monitors have been deployed in Freestone/Anderson (Big Brown) and Rusk/Panola Counties (Martin Lake) but will not have complete data for comparison to the NAAQS until 2021. Industry and state petitioners are still pursuing reconsideration rather than other more traditional implementation paths. Attainment SIP deadline is in July 2018.

EPA Response/Status: In response to Vistra’s petition for reconsideration and administrative stay, the Administrator sent a letter stating that “we intend to undertake an administrative action with notice and comment to revisit the nonattainment designation” for the three 3 TX nonattainment areas but that the designations remained in effect. We have not yet determined the mechanism and basis to revisit these designations. EPA has not responded to either of Texas’ administrative petitions.

Venue/Status: 5th Circuit; currently in abeyance with 90-day status reports (next due 4/12/18).

Area: Williamson County, IL nonattainment area (SIPC-Marion Power Station)

Petitioner: Southern Illinois Power Cooperative (SIPC), Petitions for Review, Reconsideration, and Error Correction

Issues: SIPC has twice administratively petitioned EPA to revise the nonattainment designation to attainment, submitting new information to support claims that the modeled violating receptor area is under controlled access and not ambient air. Attainment SIP deadline is in March 2018.

EPA Response/Status: In response to SIPC’s petition for error correction, the Administrator sent a letter stating that “we intend to undertake an administrative action with a notice and comment to revisit the nonattainment designation” but that the designation remains in effect. Previously, in January 2017, then-Administrator McCarthy denied SIPC’s petition for reconsideration. We have not determined the mechanism and basis to revisit these designations.

Venue/Status: DC Circuit; currently in abeyance with 90-day status reports (next due 4/30/18).

Areas: Gallia/Meigs Counties, OH (Gavin), Franklin/St. Charles Counties, MO (Labadie),

Petitioner: Sierra Club, Petitions for Review and Reconsideration.

Issues: The above areas were designated unclassifiable but Sierra Club contends the information EPA had available indicates nonattainment.

EPA Response/Status: Responded to petitions for reconsideration in separate letters, stating intention to revisit the designations by 2020 once data from newly sited monitor is available.

Venues/Status: DC Circuit. Abeyance motion denied for Gallia/Meigs Cos., consolidated with Masias et al.; EPA's merits brief was filed on 02/12/2018. Franklin/St. Charles Cos designation issue was severed and is currently in abeyance with 180-day status reports (next due 5/2/2018).

Areas with Judicial Petitions Only

Area: Martin Drake (Colorado Springs Area, CO) designated unclassifiable

Petitioners: Masias et. al., Petition for Review

Issues: Modeling submitted for this area by several parties was determined to have flaws, primarily a lack of available representative meteorological data for use in modeling, but mostly showed very high concentrations. Petitioners contend the area should have been designated nonattainment rather than unclassifiable.

EPA Response/Status: Denied "settlement offer" of voluntary remand with vacatur.

Venue/Status: DC Circuit. Consolidated with Sierra Club and KCBPU as Masias et al. Proceeding to briefing. EPA's merits brief was filed on 2/12/2018.

Area: Nearman Creek (Wyandotte County, KS) designated unclassifiable

Petitioner: Kansas City Board of Public Utilities (KCBPU), Petition for Review

Issues: Modeling demonstrating attainment was mostly reliable but not all of the permit limits used in the modeling were in effect and federally enforceable (and are still not federally enforceable, as we have not acted on the state's SIP submittal due to certain sensitive issues). Kansas submitted a request for redesignation based on the same modeling including currently state-only emission limits.

EPA Response/Status: Redesignation process is on hold pending resolution of certain issues in the related state SIP submittal or submission of other information demonstrating the area is meeting the NAAQS.

Venue/Status: DC Circuit. Consolidated with Masias et al. Proceeding to briefing. EPA's merits brief was filed on 2/12/2018.